Supreme Court, U.S.
FILED
DEC 26 1995
CLERK

No. 95-811

In The

Supreme Court of the United States

October Term, 1995

BRUCE A. LOKEN,

Petitioner,

vs.

CENTURY 21-AWARD PROPERTIES AND JAMES E. CARMICHAEL,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeals, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the questions presented by Loken's Petition for a Writ of Certiorari were raised and decided by the state trial, appellate and/or supreme courts.

2. Whether the state courts' rulings submitted for review in Loken's Petition for Writ of Certiorari were based on independent state grounds.

3. Whether the questions presented by Loken's Petition for Writ of Certiorari were the subject of a final judgment or decree by the highest court of the State of California.

4. If the Court determines that it has jurisdiction, whether the legislative enactment of a specific statute of limitation as to real estate professionals violates federal substantive due process and equal protection under the United States Constitution.

STATEMENT OF INTERESTED PARTIES

Century 21-Award Properties is a d/b/a for L.M. Osburn Real Estate Corporation. L.M. Osburn Real Estate Corporation is not a parent corporation, and there are no subsidiary corporations. None of the corporations are publicly held.

James E. Carmichael is an individual.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of Case	2
A. Proceedings in State Courts	2
B. Factual Background	3
Summary of Argument	5
Reasons for Denying the Writ	6
I. Loken's Petition for a Writ of Certiorari should be denied because he failed to raise the constitutional issues posed to this Court to the state trial, appellate, or supreme courts.	6
II. Loken's Petition should be denied because the California courts' rulings were based on independent state grounds and thus, pursuant to 28 U.S.C. § 1257(a), this Court lacks jurisdiction to accept this Petition for Writ of Certiorari.	8

Contents

Page

III. The question of the applicability of the statute of limitations found at California Civil Code § 2079.4 to a cause of action for fraud was not presented to or reviewed by the state court of appeals or the California Supreme Court. Thus, this Court has no jurisdiction over this matter in that there is no final judgment or decree as required by 28 U.S.C. § 1257(a). 9

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Gagne v. Bertram, 43 Cal. 2d 481 (1954) 10

Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) 7, 8

Loken v. Century 21 Award Properties, 36 Cal. App. 4th 263 (1995) 9, 10, 11

Monks v. New Jersey, 389 U.S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1990) 7

Seeger v. Odell, 18 Cal. 2d 409 (1941) 10

Webb v. Webb, 45 U.S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981) 7

Contents

Page

Statutes Cited:

California Civil Code § 1102 *et seq.* 2, 3, 4

California Civil Code § 1709 10

California Civil Code § 2079.4 ..... 1, 2, 3, 5, 7, 8, 9, 10, 11

28 U.S.C. § 1257(a) 1, 6, 8, 9, 11

United States Constitution Cited:

Fifth Amendment 5, 8

Fourteenth Amendment 5, 8

Rule Cited:

Supreme Court Rule 14 ..... 6, 7

Other Authorities Cited:

BAJI 12.31 (8th Ed.), 5th Witkin, *Summary of California Law*, § 675 (9th Ed.) 10

BAJI 12.45 (8th Ed.), 5th Witkin, *Summary of California Law*, § 720 (9th Ed.) 10

Contents

Page

APPENDIX

Appendix A — Table of Contents of Respondent's Brief in the Court of Appeal, State of California, Fourth Appellate District 1a

Appendix B — Excerpts of Petitioner's Petition for Review in the Supreme Court of California 12a

TO THE HONORABLE SUPREME COURT:

The Respondents, James E. Carmichael and Century 21-Award Properties, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Bruce A. Loken.

STATEMENT OF JURISDICTION

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). Respondents respectfully object to the jurisdiction of this Court for the following reasons.

1. The question of the applicability of the statute of limitations found at California Civil Code § 2079.4 as it pertains to a cause of action for fraud has not been reviewed by the highest court of the state, and thus there is no final judgment or decree pertaining to said issue.

2. This Court does not have jurisdiction to hear the claims presented in Loken's Petition for a Writ of Certiorari because said claims were not raised by Petitioner in the state court proceedings.

3. This Court does not have jurisdiction to hear the claims presented in Loken's Petition for Writ of Certiorari because the State of California has not considered and/or ruled on the federal questions presented therein.

4. Petitioner has failed to identify when, and by what method, the federal questions presented to this Court were presented to the state trial, appellate, and supreme courts.

STATEMENT OF CASE

A. Proceedings in State Courts

This Petition arises from the purchase of a single-family residence by Bruce A. Loken (Petitioner) in 1987. After discovering a crack in the cement slab of the single-family residence in 1990, Loken brought an action against various individuals and real estate brokerages involved in the sale of the residence. These defendants included the seller's real estate brokerage and agent, Century 21-Award Properties and James E. Carmichael (hereinafter collectively Carmichael). The trial court, sitting without jury, found Carmichael liable for negligent misrepresentation and per se violation of California Civil Code § 1102; the remaining defendants were found liable on these and other theories.

The trial court found all defendants jointly and severally liable to Petitioner for damages of $78,500. The trial court also ruled that all defendants were jointly and severally liable for Loken's attorneys fees of $52,040. As to Carmichael, liability for Loken's attorneys fees was premised on the "Tort of Another" doctrine.

Carmichael appealed that verdict. In their appeal, Carmichael's primary contentions were that: (1) the negligent misrepresentation cause of action was barred by the statute of limitations found in California Civil Code § 2079.4 and was not supported by substantial evidence; and (2) the trial court, which had granted a non-suit on the per se violation of California Civil Code § 1102, erred in reversing itself on this point at the end of trial.

The Court of Appeals for the State of California, Fourth Appellate District, Division One, reversed the trial court ruling,

finding that negligent misrepresentation and the per se violation of California Civil Code § 1102 were barred by the statute of limitations as prescribed in California Civil Code § 2079.4. Loken filed a Petition for Review to the Supreme Court of the State of California. On September 21, 1995, that Petition was denied.

During the trial of this matter, Loken made no claim that the application of the statute of limitations found at California Civil Code § 2079.4 was arbitrary, capricious and unreasonable in violation of federal substantive due process or equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. Similarly, said claim was not presented and/or ruled upon by either intermediate state appellate court or California Supreme Court.

B. Factual Background

On October 19, 1987, Loken viewed the exterior of the single-family residence which is the subject of the underlying litigation. During this review, Loken's real estate agent, Kenneth Harring, assured him that the patched cracks on the outside wall were normal for stucco. On the same day, Loken made a written offer to purchase the residence for $109,000. Loken accompanied Harring and his wife Rosemary, also a real estate agent, as they delivered the offer to the seller's agent (Carmichael). Harring introduced Loken to Carmichael and allegedly told Carmichael that Loken was concerned that any residence he purchased be structurally sound and not have a defective slab. Carmichael, citing his viewing of the property and a contractor's building inspection report, allegedly responded that there were no problems with the house and that it appeared to be in a structurally sound condition. Loken testified he relied on these representations by Carmichael.

On October 19, 1987, Susan Virden, the owner of the residence in question, counter-offered and Loken accepted. The counter-offer required that Loken's $1,500 good faith deposit be released to Virden when escrow opened. On October 20, 1987, Loken, who was enlisted in the Navy and assigned to a submarine, left for one week of sea operations. On October 30, 1987, while in San Diego, Loken (pursuant to California Civil Code § 1102 *et seq.*) received a copy of Virden's disclosure statement in which she stated she was aware of only one significant defect; namely, cracks in the cement driveway. Among other things, the disclosure statement included Carmichael's signature verifying that he had made a reasonably competent and diligent visual inspection of the accessible areas of the property and had not found any other defects.

Loken was away from San Diego intermittently on operations until December of 1987. Escrow closed on December 7, 1987. Before the close of escrow, Loken allegedly was never offered a walk-through inspection of the house although the sales contract provided that he was to have one within five days of the opening of escrow. However, on December 5, 1987, Loken did visit the property at the invitation of the seller (Virden).

After Loken returned to San Diego on December 4, 1987, he and Harring viewed Virden's disclosure statement. The disclosure statement referenced an inspection report provided by a general contractor. On December 6, 1987, the Harrings showed Loken an inspection report from the Virden property that was prepared by Gerald Kwiat of Quality Inspection Service. A cover letter to the inspection report stated "this house was found to be structurally sound and showing no apparent signs of displacement."

Loken moved into the residence on December 7, 1987 and resided there with roommates until July 6, 1988. After a dispute

with a roommate, Loken moved out on July 6, 1988, sealed up the windows with plywood and locked the doors. The residence remained sealed and locked until July of 1989 when Loken moved back into the residence. During the time that Loken lived in the residence in question, he allegedly spent virtually all of his time on the ground level and upper floors, seldom visiting the floor that was below ground level and that had a cracked slab.

In late January 1990, Loken discovered cracking in the stucco. On February 1, 1990, after lifting the wall-to-wall carpeting in a room on the lower level, Loken discovered a crack in the concrete slab of the house.

On March 28, 1990, Loken filed the lawsuit which is the subject of this Petition.

SUMMARY OF ARGUMENT

The California Courts in this case did not decide the question of whether the application of California Civil Code § 2079.4 (the two-year statute of limitations for real estate agents) violates the Fifth and Fourteenth Amendments to the United States Constitution. This argument was never presented by Loken to the state trial, appellate, or supreme courts. Thus, the Fourth District's decision and the California Supreme Court's review of that decision were based on independent state grounds.

Additionally, the question presented in Loken's Petition for Writ of Certiorari (the applicability of California Civil Code § 2079.4 to a fraud cause of action) was not raised to or decided by the state court in the underlying matter. The question presented to that court dealt with a finding of negligent misrepresentation, not fraud.

For all of the reasons cited above, it is Respondents' position

that pursuant to 28 U.S.C. § 1257(a) this Court lacks jurisdiction over this matter and this Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

LOKEN'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HE FAILED TO RAISE THE CONSTITUTIONAL ISSUES POSED TO THIS COURT TO THE STATE TRIAL, APPELLATE, OR SUPREME COURTS.

Rules of the Supreme Court of the United States, Rule 14, requires that:

> 1. A Petition for Writ of Certiorari shall contain, in the order indicated:
>
> * * *
>
> (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
>
> (i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent

> quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . ., so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .

Rules of the Supreme Court of the United States, Rule 14, paragraph 1(g)(i).

Loken's Petition for Writ of Certiorari contains no references which would comply to the Rule outlined above. Petitioner herein at no point during the trial of this case, or at the Appellate Court, or in his Petition to the California Supreme Court, made reference to the concept that the application of California Civil Code § 2079.4 was in any way violative of Mr. Loken's due process or equal protection rights under either the California or United States Constitutions. It has been consistently held that the United States Supreme Court is without jurisdiction to hear federal issues where the federal claim had not been raised and ruled on in the underlying state court proceedings. *Illinois v. Gates*, 462 U.S. 213, 221-223, 76 L. Ed. 2d 527, 537-539, 103 S. Ct. 2317 (1983); *Webb v. Webb*, 45 U.S. 493, 496-497, 68 L. Ed. 2d 392, 397, 101 S. Ct. 1889 (1981); *Monks v. New Jersey*, 389 U.S. 71, 26 L. Ed. 2d 54, 55, 90 S. Ct. 1563 (1990).

As the Court can see from pertinent portions of Loken's response to Carmichael's appeal at the appellate court (Respondents' App. A, 1-11) and pertinent portions of his Petition for Review at the California Supreme Court (Respondents' App. B, 1-6), the question of the constitutionality of California Civil Code § 2079.4 was never presented to the state courts.

It is therefore submitted that on this basis alone Loken's Petition for Certiorari should be denied.

II.

LOKEN'S PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURTS' RULINGS WERE BASED ON INDEPENDENT STATE GROUNDS AND THUS, PURSUANT TO 28 U.S.C. § 1257(a), THIS COURT LACKS JURISDICTION TO ACCEPT THIS PETITION FOR WRIT OF CERTIORARI.

In order for this Court to assume jurisdiction over this matter, the underlying state court must have been presented with and decided a federal question. *Illinois v. Gates*, 462 U.S. 213, 221-223, 76 L. Ed. 2d 527, 537-539, 103 S. Ct. 2317 (1983); 28 U.S.C. § 1257(a). In order to satisfy this requirement, Loken would have had to have presented to the state courts the issue of whether the state courts' application of California Civil Code § 2079.4 was violative of the United States Constitution and specifically the Fifth and Fourteenth Amendments thereto. As this Court can see from the pertinent portions of Loken's response to Carmichael's appeal (Respondents' App. A, 1-11), the Fourth District's ruling thereon, reproduced in the appendix to Loken's Petition for Certiorari (Petitioner's App. A, 1-18), and pertinent portions of Loken's Petition for Review to the California Supreme Court (Respondents' App. B, 1-6), the question of the constitutionality of California Civil Code § 2079.4 was never presented to the California courts for their determination.

In light of the aforementioned, the only logical conclusion is that the Fourth District's ruling at the appellate court level and the California Supreme Court's review of said ruling were based on independent state grounds. A review of the appellate court's opinion, reproduced in the appendix to Loken's Petition for

Certiorari (Petitioner's App. A, 1-18), further supports the fact that the California state courts in the *Loken* matter did not rule on the question of whether California Civil Code § 2079.4 is violative of the United States Constitution.

Therefore, it is once again respectfully submitted that this Court lacks jurisdiction to accept Loken's Petition and said Petition must be denied.

III.

THE QUESTION OF THE APPLICABILITY OF THE STATUTE OF LIMITATIONS FOUND AT CALIFORNIA CIVIL CODE § 2079.4 TO A CAUSE OF ACTION FOR FRAUD WAS NOT PRESENTED TO OR REVIEWED BY THE STATE COURT OF APPEALS OR THE CALIFORNIA SUPREME COURT. THUS, THIS COURT HAS NO JURISDICTION OVER THIS MATTER IN THAT THERE IS NO FINAL JUDGMENT OR DECREE AS REQUIRED BY 28 U.S.C. § 1257(a).

Loken, in his Petition to this Court, has stated the Questions Presented as follows:

> Whether, in a case of first impression where a party has prevailed against a real estate licensee under a statute which specifically states that the limitation of actions for *fraud* is three years, it is it is [sic] arbitrary, capricious and unreasonable in violation of federal substantive due process [under Issue Two, equal protection] under the Fourteenth Amendment of the U.S. Constitution for the state to then enforce a statute which is silent as to a limitation on actions for *fraud* as

> establishing a two-year limitation on *fraud* for real estate licensees. [emphasis added]

The elements of intentional misrepresentation (or what is commonly referred to in California as fraud) and negligent misrepresentation are different. Negligent misrepresentation is not merely a lesser included form of intentional misrepresentation or fraud. The elements of fraud which give rise to a cause of action for intentional misrepresentation are (a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damages. California Civil Code § 1709; *Seeger v. Odell*, 18 Cal. 2d 409, 414 (1941); BAJI 12.31 (8th Ed.), 5th Witkin, *Summary of California Law*, § 676 (9th Ed.).

Negligent misrepresentation, on the other hand, occurs where the defendant makes false statements, honestly believing that they are true, but without reasonable grounds for such belief. *Gagne v. Bertram*, 43 Cal. 2d 481, 487, 488 (1954); BAJI 12.45 (8th Ed.), 5th Witkin, *Summary of California Law*, § 720 (9th Ed.).

In coming to its decision in this matter, the Fourth District Court of Appeals held, "Appellants contend the *negligent misrepresentation* cause of action against them was time barred. We agree." *Loken v. Century 21 Award Properties*, 36 Cal. App. 4th 263, 268 (1995); reproduced in the appendix to Loken's Petition for Certiorari (Petitioner's App. A, 6) (emphasis added).

Later in the Decision, after discussing the applicability of California Civil Code § 2079.4 to a cause of action for negligent misrepresentation, the Appellate Court stated as follows: "In sum, where the *negligent misrepresentation* cause of action is derived from the duty to inspect and disclose under § 2079, there

can be no question that it falls within the two-year limitation period of section 2079.4." *Loken, supra,* at 273; reproduced in the appendix to Loken's Petition for Certiorari (Petitioner's App. A, 15) (emphasis added).

The question of if and under what circumstances a cause of action for fraud will be time barred by the two-year statute of limitations found at California Civil Code § 2079.4 was not decided by the underlying State Courts. Therefore, there has been no final decree or judgment by the highest court of the State of California as to the questions presented by Loken's Petition herein. Consequently, it is once again respectfully submitted that, pursuant to 28 U.S.C. § 1257(a), this Court should deny Loken's Petition for Writ of Certiorari.

CONCLUSION

Carmichael prays that this Court deny Loken's Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and the Court lacks jurisdiction over the issues presented.

Respectfully submitted,

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APPENDIX A — TABLE OF CONTENTS OF RESPONDENT'S BRIEF IN THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

CIVIL NO. D017105

BRUCE A. LOKEN

Plaintiff and Respondent

v.

CENTURY 21-AWARD PROPERTIES

Defendants and Appellants

Appeal from the Superior Court of San Diego County
The Honorable Victor E. Bianchini, Judge

RESPONDENT'S BRIEF

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Appendix A

TABLE OF CONTENTS

TABLE OF CASES iv

TABLE OF STATUTES vi

CALIFORNIA CONSTITUTION vii

SENATE BILLS vii

CALIFORNIA RULES OF COURT vii

JURY INSTRUCTIONS vii

ENCYCLOPEDIAS vii

I INTRODUCTION 1

II STATEMENT OF THE CASE 2

III STATEMENT OF FACTS 4

A. PURCHASE OF HOME 4

B. PRETRIAL 6

C. TRIAL BY COURT 6

D. IN-TRIAL MOTIONS 8

E. STATEMENT OF DECISION 9

F. POST TRIAL HEARINGS 11

Appendix A

G. JUDGMENT AND APPEAL 12

IV ISSUES ON APPEAL 12

V STANDARD OF REVIEW 12

VI LEGAL ARGUMENT 13

A. SUMMARY OF ARGUMENT 13

B. Lower Court Did Not Err. It Was Compelled to Reverse Its Earlier Ruling On The Application of the Limitation Period of Civil Code Section 2079 In Order To Comply With Law. That Limitation Applies To Negligence, Not to Fraud 15

C. The Lower Court Did Not Prejudice CENTURY/ CARMICHAEL by Allowing Evidence of Negligent Misrepresentation to be Presented When, at the Time of Making Its Tentative Ruling, It Alerted All Parties That it Would Likely Reverse That Ruling 20

D. Substantial Evidence Supported The Lower Court's Proper Holding That CENTURY/CARMICHAEL Are Liable For Negligent Misrepresentation. 21

1. The elements of negligent misrepresentation 21

a. CARMICHAEL made an untrue representation of a past or existing fact 22

b. CARMICHAEL made his untrue representation without any reasonable ground upon which he could base his belief of the truth of his representation 22

c. CARMICHAEL made his misrepresentation with the intent to induce plaintiff's reliance .. 23

d. LOKEN justifiably relied upon misrepresentation without knowledge of its falsity 23

e. LOKEN's damage resulted from justifiable reliance on CARMICHAEL's misrepresentations 24

E. The Lower Court Applied The Correct Statute Of Limitations To LOKEN's Civil Code Section 1102 Claim ... 26

F. CENTURY/CARMICHAEL Were Not Prejudiced By Reversal Of The TENTATIVE Ruling on per se Violation Of Civil Code Section 1102. At The Time Of Making It, The Lower Court Advised Them That it Was Subject To Further Review For Compliancewith Law 27

G. CENTURY/CARMICHAEL Have Expressly Waived Their Right To Appeal On The Issue Of The Lower Court's Reconsideration Of Its Earlier Ruling ..... .29

H. If The Lower Court Erred In Applying The Measure Of Damages, That Error Was Invited and Is Not Appealable 29

Appendix A

I. LOKEN Produced Proper Evidence To Show The Diminution in Value Of The Property 30

J. The Trial Court Properly Applied the "Third Party Tort" Theory To Determine CENTURY/CARMICHAEL's Liability For Attorney Fees 31

1. Each Of The Defendants Acted Independently And Not As A Co-tortfeasor With Any Other Defendant 31

2. The Court Below Was Substantively Correct In Its Application Of The Tort Of Another Doctrine To This Case 32

3. The Court Below Was Procedurally Correct In Its Application Of The Tort Of Another Doctrine To This Case. 33

4. Even If The Doctrine Of Third Party Tort Was Not Properly Pleaded It Still Is Not Give Rise To Reversible Error In This Instance. 34

K. The Court Below Did Not Err or Abuse Its Discretion In Denying CENTURY/CARMICHAEL's Indemnity Claim Against Their Co-defendants. 36

L. Notwithstanding The Outcome Of The Appeal For Indemnity, The Judgment Entered In Favor Of LOKEN Stands Unaltered And In Full Force And Effect. 38

VII CONCLUSION 39

Appendix A

TABLE OF CASES

Page Number

American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578 39

Arrowhead Mutual Service Co. v. Faust (1968) 260 Cal.App.2d 567 24

Beneficial Standard Properties, Inc v. Scharps (1977) 67 Cal.App.3d 227 35

Bloniarz v. Rolosom (1969) 70 Cal.2d 143 38

Bondulich v. O. E. Anderson Co. (1962) 210 Cal.App.2d 12 30

Brady v. Carmen (1960) 179 Cal.App.2d 63 18

Brandt v. Superior Court (1985) 37 Cal.3d 813 ..... 34, 35

Bullis v. Security Pacific National Bank (1978) 21 Cal.3d 801, 815 13

Continental Airline Inc. v. McDonnell Douglas Corp. (1989) 216 Cal.App.3d 388 21

Cooper v. Jeyne (1976) 56 Cal.App.3d 860 ..... 16, 17

Appendix A

Davis v. Air Technical Industries, Inc.
(1978) 22 Cal.3d 1 ..... 32, 33

Dinkins v. American National Insurance Co.
(1979) 92 Cal.App.3d 222 35

Durkee v. Chino Land and Water Co.
(1907) 151 Cal. 561 30

Easton v. Strassburger (1984) 152 Cal.App.3d 90
..... 8, 15, 16, 17, 18, 19, 21, 36, 39

Ellison v. Ventura Port District
(1978) 80 Cal.App.3d 574, 581 13

Estate of Kretschmer
(1965) 232 Cal.App.2d 29 29

Evje v. Citv Title Insurance Co.
(1953) 120 Cal.App.2d 488, 492 ..... 13, 25

Fed-Mart Corp. v. Pell Enterprises, Inc.
(1980) 111 Cal.App.3d 215 35

Ferraro v. Southern California Gas Co.
(1980) 102 Cal.App.3d 33 ..... 29, 30

Gagne v. Bertran
(1954) 43 Cal.2d 481 17

Glass v. Gulf Oil Corp.
(1970) 12 Cal.App.3d 412 ..... 34, 36

Appendix A

Goddard v. South Bay Union High School District (1978) 79 Cal.App.3d 98, 105 12

Gray v. Don Miller and Associates, Inc. (1984) 35 Cal.3d 498 33

Hasson v. Ford Motor, Co. (1977) 19 Cal.3d 530 25

Kantlehehner v. Bisceglia (1951) 102 Cal.App.2d 1 30

Lingsch v. Savage (1963) 213 Cal.App.2d 729 ..... 16, 17

Marriage of Mix (1975) 14 Cal.3d 604 ..... 24, 25

Melnyk v. Robledo (1976) 64 Cal.App.3d 618 35

Mission Imports, Inc. v. Superior Court (1982) 31 Cal.3d 921,932 13

Nestle v. City of Santa Monica (1972) 6 Cal.3d 920 13

Overgaard v. Johnson (1977) 68 Cal.App.3d 821 33

Peterson (sic) v. Kennedy (1982) 128 Cal.App.3d 976 ..... 32, 33

Appendix A

Prentice v. North American Title Insurance Guarantee Corp. (1963) 59 Cal.2d 618 ..... 31, 32, 34, 35

South Bay Irr. Dist v. California-American Water Co. (1976) 61 Cal.App.3d 944 24

Spencer v. Harmon Enterprises, Inc. (1965) 234 Cal.App.2d 614 34

Stoll v. Superior Court (1992) 9 Cal.App.4th 1362 19

Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal.App.4th 34 ..... 32, 33, 34

Walters v. Marler (1978) 83 Cal.App.3d 1 33

TABLE OF STATUTES

Civil Code section 1102 ..... 2, 3, 6, 8, 9, 10, 12, 13, 14, 26, 27

Civil Code section 1572 ..... 20, 25

Civil Code section 1710 25

Civil Code section 1717 11

Civil Code section 2079 ..... 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23, 26, 27

Civil Code section 3333 33

Appendix A

Code of Civil Procedure section 338 ..... 9, 10, 17, 19, 27

Code of Civil Procedure section 340.6 19

Code of Civil Procedure section 475 31

Code of Civil Procedure section 632 10

Code of Civil Procedure section 1021 33

CALIFORNIA CONSTITUTION

Cal. Constitution Article VI section 13 ..... 13, 31

Cal. Constitution Article VI section 4 1/2 36

SENATE BILLS

Senate Bill 453 (Robbins) 17, 27

CALIFORNIA RULES OF COURT

California Rules of Court, Rule 232 10

JURY INSTRUCTIONS

BAJI 2.20 25

ENCYCLOPEDIAS

4 Witkin, Sum. Cal. Law 8th Ed.
Torts §445 @ p. 2710 20

Appendix A

9 Witkin, Cal. Procedure 3d Ed.
Appeal §307 @ p. 317 28

9 Witkin, Cal. Procedure 3d Ed.
Appeal §311 @ p. 321 31

APPENDIX B — EXCERPTS OF PETITIONER'S PETITION FOR REVIEW IN THE SUPREME COURT OF CALIFORNIA

IN THE

SUPREME COURT OF CALIFORNIA

BRUCE A. LOKEN

Plaintiff and Appellant

vs.

CENTURY 21-AWARD PROPERTIES, et al

Defendant and Respondent

After A Decision By The Court of Appeal
Fourth Appellate District, Division One
(Case No. D017105)

PETITION FOR REVIEW

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Appendix B

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

NATURE OF THE CASE AND PROCEDURAL HISTORY .. 2

A. The Underlying Claim 2

B. The Action And The Court's Award 4

C. The Court of Appeal's Decision 5

WHY REVIEW SHOULD BE GRANTED 5

Issue Number 1 5

Issue Number 2 8

Issue Number 3 8

Issue Number 4 9

LEGAL DISCUSSION 10

I. CIVIL CODE SECTION 2079.4 WAS DESIGNED TO LIMIT THE LIABILITY OF REAL ESTATE LICENSEES FOR A CONTRACTUAL BREACH OF DUTY. IT WAS ERROR FOR THE APPELLATE COURT TO APPLY THIS SECTION TO THE FRAUD OF NEGLIGENT MISREPRESENTATION 10

Appendix B

II. THE APPELLATE COURT ERRED IN APPLYING THE LIMITATION OF ARTICLE 2, SECTION 2079 TO ARTICLE 1.5, SECTION 1102 12

III. AN INTERPRETATION OF SECTION 2079 WHICH REDUCES THE RIGHTS AND BENEFITS OF HOME BUYERS IS CONTRARY TO THE STATED LEGISLATIVE INTENT 13

IV. CONTRACTUALLY INTRODUCING A SHORTENED PERIOD IN WHICH A HOME BUYER MAY SEEK REDRESS FOR DAMAGE CAUSED BY THE NEGLIGENT MISREPRESENTATION OF A REAL ESTATE LICENSEE IS CONTRARY TO PUBLIC INTEREST AND CALIFORNIA LAW 14

CONCLUSION 15

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Allstate Insurance Company v. Hanster
765 F. Supp. 614 (N.D. Cal. 1991) 13

Dodge Stationery Co. v. Dodge
(1904) 145 Cal 380 7

Appendix B

Easton v. Strassburger
(1984) 152 Cal.App.3d 90 ..... 2, 6, 7, 8

Pelletier v. Alameda Yacht Harbor
(1986) 88 Cal.Ap.3d 1551 14

Tunkl v. Regents of University of California
(1963) 60 Cal.2d 92 14

STATUTES

Business and Professions Code
10080 11
10176 11
10177 11

Civil Code
Section 1102 ..... 1, 4, 5, 8, 9, 10, 11, 12, 14

Section 1668 ..... 10, 13, 14, 15

Section 2079 ..... 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

Code of Civil Procedure
Section 338 ..... 1, 4, 6, 8, 9, 13

Insurance Code
11589 9

TEXTS

5 Witkin, Summary of California Law (9th Ed.) Torts, § 720 et seq. 7

Appendix B

IN THE

SUPREME COURT OF CALIFORNIA

BRUCE A. LOKEN

Plaintiff and Appellant

vs.

CENTURY 21-AWARD PROPERTIES, et al

Defendant and Respondent

After A Decision By The Court Of Appeal
Fourth Appellate District, Division One
(Case No. D017105)

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether, when a fraud has been perpetrated by a real estate licensee in the sale of a house, the two year limitation of Civil Code Section 2079.4, which is silent as to fraud, may supersede and replace the three year limitation of Code of Civil Procedure Section 338 subdivision (d) which is fraud specific.

2. Whether the limitation of Civil Code Section 2079.4, which, by its own language, applies only to Chapter 3. Article 2. may be extended to include Civil Code Section 1102 in Chapter 2. Article 1.5 (Civil Code Section 1102.)

Appendix B

3. Whether Civil Code Section 2079 et seq, held to codify *Easton v. Strassburger* (1984) 152 Cal.App.3d 90 (*Easton*), a case which stands for protection of the home buyer, may be construed to limit and reduce the home buyer's rights against a fraudulent real estate licensee.

4. Whether inclusion of the Civil Code section 2079.4 limitation in a contract governing the purchase and sale of real property is, so far as it limits the rights of the public to commence legal actions for fraud, exculpatory and therefore against the policy of the law.

NATURE OF THE CASE AND PROCEDURAL HISTORY

A. The Underlying Claim

Plaintiff Loken purchased a single family residence in 1987, taking occupancy on December 7, 1987. The Seller provided Loken with a copy of her disclosure statement revealing that the only defect of the property was a crack in the concrete driveway. The broker Century 21-Award Properties, through its selling agent Jim Carmichael (Carmichael) verified the accuracy of that disclosure statement and stated, in writing, that he had conducted "a reasonably competent and diligent visual inspection of the accessible areas of the property" and had not found any other defects. Carmichael also assured Loken that there were no problems with the house and that it was structurally sound. Carmichael, aware of the relationship, presented Loken with an

. . .

* * *